Supreme Court, U.S.
FILED

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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

RAINBOW GROUP, LTD., AND ALAN SAGER,
Petitioners,

v.

JENNIFER CASEY, ET AL.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit over-extended the limits imposed by this Court on the exclusive federal jurisdiction of 28 U.S.C. § 1338, to the statutory grants of concurrent jurisdiction under 28 U.S.C. §§ 1331, 1337, 1441.

2. Whether the artful pleading exception to the well pleaded complaint doctrine still exists apart from complete federal preemption.

3. Whether Respondents may avoid a federal forum by artfully pleading a complaint to conceal the existence of a federal question.

LIST OF PARTIES

Petitioners

Rainbow Group, Ltd.
Alan Sager, Austin, Texas

Respondents

Jennifer Casey Washington, Austin, Texas
Seantel Wilmes Cockle, Austin, Texas
Ava Lott, Austin, Texas
Guadalupe Garcia, Elgin, Texas

And members of the following certified class:

All hairstylists employed by Defendants Rainbow Group Ltd. and Alan Sager at anytime between February 20, 1988 and the present.

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RAINBOW GROUP, LTD., AND ALAN SAGER,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

The Respondents filed suit on a claim of breach of contract implied in law by the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 621 *et seq.* The United States District Court for the Western District of Texas entered judgment for Petitioners. The United States Court of Appeals for the Fifth Circuit reversed for want of jurisdiction and entered judgment in this case on February 19, 1997. This Court has jurisdiction over this appeal from a judgment entered by the United States Court of Appeals for the Fifth Circuit. 28 U.S.C. § 1254. No court has entered an order on rehearing or extension of time.

STATUTES AND REGULATIONS

28 U.S.C. § 1331 Federal Question

The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1337 Commerce and Antitrust Regulations; Amount in Controversy, Costs

Text set forth in Appendix C

28 U.S.C. § 1338 Patents, Plant Variety Protection, Copyrights, Mask Works, Trademarks, and Unfair Competition

Text set forth in Appendix C

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Text set forth in Appendix C

STATEMENT OF THE CASE

Four "Supercuts" hairstylists filed two lawsuits against their employer Rainbow Group, Ltd., and its general partner, Alan Sager, seeking wages allegedly due for "off the clock" time: time when the hairstylists were present, but were not in fact serving customers.[4]

Respondents filed an original petition in state district court in 1992, seeking wages for off the clock time.

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[1] Respondents first filed an action in federal court under the Fair Labor Standards Act in *Josephine Johnson and Jennifer Casey v. Rainbow Group, Ltd., A Limited Partnership and Alan Sager*; Civil Action No. A-91-CA-723, for compensation for time they alleged they were held off the clock. It is undisputed that Respondents are not minimum wage employees; their wages average including tips, between $9.00 and $13.00 per hour. Respondents do not work overtime. As noted by the Fifth Circuit's recent decision in this case,

Respondents' First Amended Original Petition, filed on August 26, 1993, first set forth their theory that the FLSA, through Labor Department rules, creates a contractual duty. Respondents' claims under the amended petition were for breach of an express oral contract, and/or in the alternative, for breach of contract terms implied in law by the requirements of the FLSA. On September 8, 1993, within thirty days of receiving the amended pleading, Petitioners removed the case to fedral court undr 28 U.S.C. §§ 1331, 1337, and 1441, based on the federal questions arising under 29 U.S.C. § 621, *et seq.*

The case was tried by consent of the parties to a United States Magistrate Judge pursuant to FED. R. CIV. P. Rule 73 and 28 U.S.C. § 636, without a jury. The magistrate (hereinafter "trial court") ruled in favor of Petitioners on the facts and the law, and the District Court entered judgment on the trial court's findings.

The Respondents appealed alleging, *inter alia,* that the trial court erred in finding that a federal question existed in this case. The Fifth Circuit reversed the trial court's finding of federal subject matter jurisdiction and remanded this case to be dismissed. App. A, pg. 12. The Fifth Circuit relied upon *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988) in holding that Respondents' claims for relief would not support federal question jurisdiction because, the Fifth Circuit stated, the claims were two separate theories supporting one claim and, as one theory did not rely upon federal law, federal question jurisdiction did not exist. App. A, pg. 6a. The Fifth Circuit did not rule on Petitioners' claim that the Respondents art-

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the FLSA governs only minimum and overtime wages. That action was dismissed.

Respondents did not, in their first petition or in any other papers, assert that the FLSA created a contractual right to be compensated for the time at issue. In fact, when Petitioners filed "special exceptions" to Respondents' petition, the state court agreed that Respondents failed to adequately plead *any* contract claim.

fully pled to conceal the presence of a federal question and implied that an artful pleading exception no longer exists absent complete preemption of the state law claim by a federal law. The Fifth Circuit held the FLSA does not completely preempt state law claims for employment compensation even when, as here, claimants allege that FLSA creates a state law contractual right apart from any statutory remedy set forth in the FLSA. Petitioners now file this Petition for Writ of Certiorari.

This Court has jurisdiction to hear this case on a Petition for Writ of Certiorari under 28 U.S.C. § 1254.

ARGUMENT

I. *WILLY v. COASTAL CORPORATION* IS WRONGLY DECIDED AND SHOULD BE OVERTURNED

In denying jurisdiction over this case the Fifth Circuit relied upon its opinion in *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988). From *Willy* the Fifth Circuit took the proposition that federal jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1441 of questions "arising under" federal law is based upon claims, not theories, and if alternate theories support a single claim, each theory must rely upon a federal question for the claim to support federal jurisdiction. App. A. pg. 6a. The Fifth Circuit cast Respondents' state law claim for breach of an express contract and their claim for breach of a contract implied by federal statutory requirements as alternate theories for one claim. App. A, pg. 6a. The Fifth Circuit then ruled that the independent nature of the state law "theory" defeated jurisdiction under *Willy*. App. A, pg. 6a.

Petitioners contend *Willy* incorrectly extends the limits on the exclusive federal jurisdiction of patent law to the concurrent jurisdictional statutes of 28 U.S.C. §§ 1331, 1337, and 1441. The *Willy* decision defeats pendent jurisdiction, causes timing problems for removal, and invites artful pleading to defeat federal jurisdiction.

In *Willy*, the Fifth Circuit limited federal question jurisdiction under § 1331 on the basis of this Court's decision in *Christianson v. Colt Indus. Op. Corp.*, 486 U.S. 800 (1988). *Willy*, 855 F.2d at 1171. The *Christianson* decision, however, was based on an allegation of jurisdiction under 28 U.S.C. § 1338, which provides exclusive jurisdiction to the federal courts to decide questions of patent law. *Christianson*, 486 U.S. at 809. Because § 1338 jurisdiction is exclusive, it completely preempts state courts from hearing patent claims. 28 U.S.C. § 1338(a). A holding that a case may be brought under § 1338 is also a holding that it may *not* be brought under state law. Recognizing that the validity of a federal patent might be only one of many issues in a single state law claim, the *Christianson* court created the idea that the "arising under" language of § 1338 was based upon claims and not theories. *Christianson*, 486 U.S. at 811. If one claim (such as a breach of contract) involved many theories, one of which might be based upon patent infringement, the claim did not arise under § 1338 unless all theories alleged depended upon a federal question. *Id.* at 810. The reasoning of *Christianson* resulted from the mandatory nature of § 1338. This Court did not extend the *Christianson* holding beyond § 1338 to the concurrent jurisdictional statutes under which this case arose. In *Willy*, however, the Fifth Circuit relied on the *Christianson* decision to extend the doctrine to a case brought under 28 U.S.C. §§ 1331, 1337, and 1441.

Christianson relied upon language in *Franchise Tax Bd. v. Const. Laborers Vac. Trust*, 463 U.S. 1 (1983), for the proposition that federal question jurisdiction is based upon claims, not the theories underlying a claim. *Christianson*, 486 U.S. at 810. *Franchise Tax Bd.*, however, only considered whether one possible defense based upon a federal statute, among many other possible defenses, so preempted the tax claim alleged by the State of California that the whole case could be said to "arise

under" federal law.[2] The *Franchise Tax Bd.* holding was consistent with the by then well recognized doctrine that removal may not be based upon a federal defense unless the entire cause of action is preempted by the federal statute. *Christianson* relied upon *Franchise Tax Bd.* to limit federal courts' jurisdiction of claims arising under § 1338, without addressing the traditional limitations upon defensive removal relied upon in the *Franchise Tax Bd.* holding.

Recognizing that *Christianson* relied upon the language of *Franchise Tax Bd.* developed in the context of § 1331 jurisdiction, however, the Fifth Circuit in *Willy* extended the *Christianson* doctrine to all claims arising under jurisdiction of 28 U.S.C. §§ 1331, 1337, and 1441. *See, generally, Willy*, 855 F.2d at 1165-71. However, *Willy* did this without considering the vast differences between the various jurisdictional statutes and the defensive nature of the claims in *Franchise Tax Bd. Id.* at 1171. Section 1338 jurisdiction is exclusive to federal courts, but §§ 1331, 1337, and 1441 confer upon federal courts jurisdiction that runs concurrent with the courts of the states. 28 U.S.C. §§ 1331, 1337, *and* 1441. Under § 1338 jurisdiction, difficult issues of federal-state relations might arise that a federal court could not avoid because of the exclusive nature of § 1338 jurisdiction. However, under the concurrent jurisdiction provided by §§ 1331, 1337, and 1441, these questions may be considered on a case-by-case basis by the court best able to deal with them.

A. *Willy v. Coastal Corp.* Defeats 28 U.S.C. § 1441 Pendent Jurisdiction

Section 1441 was a broad grant of jurisdiction to the federal courts to assure that the federal courts retain the

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[2] "Unlike the contract rights at issue in *Avco*, the State's right to enforce its tax levies is of no concern to the federal statute. For that reason *as in Gully*, [citation omitted], on the face of a well pleaded complaint there are many reasons completely unrelated to the provisions and purposes of ERISA why the State may or may not be entitled to relief." *Franchise Tax Bd.* at 26-27.

power to decide questions arising under federal law. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). To that purpose, subpart (c) of § 1441 even provides jurisdiction over separate and independent state law claims when joined with claims arising under federal law. The *Willy* decision emasculates that grant of jurisdiction by holding that a claim based on a state law theory when coupled with a federal theory defeats removal under subpart (b) of section 1441, regardless of whether the alternative federal theory can in fact stand alone as a claim arising under federal law. *Willy*, 855 F.2d at 1170-71. The more closely related federal and state claims are, i.e. if they may be deemed alternative theories, the less likely it is that a federal court will hear either the state or the federal question. In *Willy*, the Fifth Circuit narrowly focused on an interpretation of the term "arising under," defeating the intent of Congress in enacting § 1441 and abdicating the federal courts' responsibility to decide federal questions.

B. *Willy v. Coastal Corp.* Creates a "Catch 22" for Removal

As applied by the Fifth Circuit in its order reversing the trial court's determination of jurisdiction, *Willy* creates an unavoidable trap for defendants who might otherwise have a right to remove a case to federal court. All a plaintiff need do to avoid removal is allege an alternative theory of a claim somewhat analogous to the federal claim under which the plaintiff truly seeks recovery. If the state theory actually amounted to a separate claim, a defendant would be on notice that the case involved a federal question and the case would otherwise be removable. The defendant, however, could not remove the case as long as the claim remained characterized as a theory. App. A, pg. 1. The plaintiff might simply let the state claim remain a "theory" through trial to prevent any risk of being removed. A defendant would have to remove a case simply to test the independent nature of a plaintiff's theory.

The Fifth Circuit's application of *Willy* creates confusion for all parties because it ties the propriety of removal to the degree a plaintiff's claims of state and federal law are intertwined. This confusion compounds the difficulties of determining when a claim arises under federal law with the complications of deciding how intertwined a federal question is with a state theory. Further, *Willy* provides no guidance to lower courts to help them decide when a defendant should know that a plaintiff's claims are sufficiently not intertwined so that the defendant should be on notice that removal is proper. A defendant's only option in these situations is to remove all cases that have a federal claim, and let the federal courts decide each issue.

In the case at bar, Respondents amended their complaint to add a claim for breach of a contract implied in law predicated upon FLSA definitions. Petitioners removed at this point because this appeared to be reasonable notice that Respondents' petition then involved a question arising under federal law. Had Petitioners not removed, Respondents might have later amended to state an outright FLSA claim and reasonably asserted that Petitioners had waived removal because Petitioners had notice of Respondents' reliance upon the FLSA. Even as Petitioners removed this case based upon Respondents' amended petition, the Respondents challenged the removal as untimely because of vague allegations made previously in the case.

C. *Willy v. Coastal Corp.* Invites Artful Pleading

Willy invites plaintiffs to invent state law "theories" that parallel federal causes of action. By pairing a claim under a federal law with another, potentially wholly fictitious, theory under state law a plaintiff can ensure that he will not be removed even on the most important of federal questions. A defendant will have no recourse to remedy a plaintiff's forum manipulation.

A plaintiff supposedly risks preclusion of his federal claims by choosing a state forum. However, where, as here, a state court still has jurisdiction to decide the federal questions, there is no serious risk that a plaintiffs' claims would be precluded. On a claim such as the one at bar, concurrent jurisdiction between courts exists and by artfully pleading a plaintiff risks nothing.

II. WHETHER THE ARTFUL PLEADING EXCEPTION TO THE WELL PLEADED COMPLAINT DOCTRINE STILL EXISTS APART FROM COMPLETE PREEMPTION

The determination of whether a cause of action presents a federal question depends upon a plaintiff's well pleaded complaint. However, there are two exceptions to the well pleaded complaint rule that allow removal even if a plaintiff's complaint does not, on its face, present a federal question. *Aaron v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 876 F.2d 1157, 1161 (5th Cir. 1989). The exception cited most often is the complete federal preemption of a plaintiff's cause of action. *Id.* The other exception to the well pleaded complaint doctrine is artful pleading. *See id.* The artful pleading exception allows a defendant to remove a case to federal court based upon a federal question, despite a plaintiff's well pleaded complaint, if the plaintiff pleads to conceal the existence of the federal question. *Aaron,* 876 F.2d at 1161. This applies even in cases where complete federal preemption of a plaintiff's state law claim does not exist.

The Fifth Circuit did not rule upon Petitioners' contention that Respondents artfully pleaded to conceal the substantial federal question inherent in Petitioners' claim of an implied contract. In a footnote to its opinion denying jurisdiction in this case, the Fifth Circuit suggests that no exception remains to the well-pleaded complaint rule other than complete preemption. App. A, pg. 8, note 4. Respondents strongly disagree that a claim of artful pleading is limited to complete preemption.

The Fifth Circuit cited *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 369 n.7 (5th Cir. 1995) to suggest that this Court in *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425, 2430 (1987), limited the arftul pleading doctrine to cases which were completely preempted by federal law. After the *Caterpillar* decision and before *Wichita Falls Indep. Sch. Dist.*, however, the Fifth Circuit decided *Aaron*. In *Aaron*, the Fifth Circuit cited Professor Wright for the proposition that "[i]f the court concludes that the plaintiff's failure to plead her federal claim was not in good faith, but rather was an attempt to conceal the fact that her claim was truly federal, the court will allow the removal." *Aaron*, 876 F.2d at 1161. While this proposition has been cited most often in cases of preemption, it holds open the possibility that an artfully pleaded complaint can be removed absent preemption. In fact, while *Aaron* utilizes the same analysis for the two doctrines, it states that complete preemption is a totally separate issue from artful pleading. *Id.* To the extent that *Wichita Falls* forecloses the posibility of an artful pleading exception to a well-pleaded complaint doctrine, it conflicts with *Aaron*. The Fifth Circuit's decision in this case notes but does not resolve that conflict. App. A, pg. 8, note 4. If the artful pleading exception to the well-pleaded complaint doctrine is limited to instances of complete preemption, substantial federal questions such as the one at bar will never find their way to federal court. Further, by denying jurisdiction in this case based upon the well-pleaded complaint doctrine, while failing to rule upon an exception squarely presented by the Petitioners, the Fifth Circuit has denied Petitioners their right to have federal questions heard in a federal forum. This Court should grant certiorari to resolve the question of the existence of the artful pleading doctrine.

III. WHETHER RESPONDENTS MAY AVOID A FEDERAL FORUM BY ARTFULLY PLEADING A COMPLAINT TO CONCEAL THE EXISTENCE OF A FEDERAL QUESTION

The Fifth Circuit erred in denying jurisdiction in this case because Respondents' complaint was artfully pleaded to conceal a substantial federal question. The Respondents rely upon the Fair Labor Standards Act to create a duty not agreed upon by the parties. Because Texas is an employment-at-will state, this duty must be independent of state law. Respondents' FLSA argument is not an alternate theory under contract law; it is an alternate claim requiring an interpretaion of a federal statute. Through a circular argument, though, the Respondents commingle their claims in an atempt to turn this into a breach of contract claim. Respondents' claim that Texas contract law incorporates definitions from the FLSA presents a substantial federal question of whether the FLSA *definitions* govern all employment relations even absent explicit FLSA applicability. Application of the artful pleading exception to the well-pleaded complaint rule supports removal of this very federal question.

It is clear that Respondents' implied contract/term claim cannot survive without reliance upon FLSA requirements. Distilled to its basic elements, Respondents' implied contract/term claim is that Texas employment relationships incorporate all requirements of law existing at the time of employment, FLSA requirements are binding upon Petitioners, hence Texas law implies contracts and terms between the parties incorporating FLSA requirements.[3] Inherent in this argument is that the terms

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[3] Appellants clearly state their reliance upon FLSA requirements in their brief on appeal:

> "In Texas, the law in existence at the time and place of making a contract constitutes an integral part of the contract, just as

of the FLSA must be binding upon the Petitioners by the statute's own requirements.[4] Respondents' rely on nothing other than the terms of the FLSA itself to make the FLSA binding upon Petitioners. Therefore, whether the terms of the FLSA are binding upon the Petitioners is a question arising directly under federal law.[5] Respondents attempt to dress up this question as an implied contract/term under state law. However, under Respondents' own reasoning, if the FLSA is not binding upon Petitioners by its own terms, Respondents' argument must fail. Here, Respondents can not establish their alleged state law breach of an implied contract claim/term unless they can prove the FLSA establishes requirements that govern all employment relationships. Respondents' alleged state law claim necessarily turns on the type of issue cited in *Kidd v. Southwest Airlines*, 891 F.2d 540, 542 (5th Cir. 1990) as arising under federal law; one where federal law must be construed or established in order to recover under state law.

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if it had been expressly incorporated therein." Appellants Brief pg. 27

' Moreover, FLSA overtime regulations specifically require that employees be paid their regular hourly rate for all hours of work up to 40 hours per week, including non-productive waiting time hours." Appellants Brief at 28-29, *footnote omitted.*

"Here, the alleged modification of the contract instituted by the store managers—holding Plaintiffs off the clock when no customers were in the store—is directly contrary to the FLSA definition of work time which *mandates* payment for such waiting time." Appellants Brief, pg. 30

[4] In other words, a Texas contract can not incorporate a provision of law if that provision is not law.

[5] "A case arises under federal law when the vindication of a right under state law necessarily turns upon some construction of federal law, [citations omitted] or when the plaintiff must establish both the correctness and applicability to his case of a federal law proposition, in order to secure the relief sought." *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540, 542 (5th Cir. 1990) citing *Franchise Tax Board v. Const. Laborers Vacation Trust* 463 U.S. 1 (1983) *and Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

CONCLUSION

The Court should grant Certiorari to review the Fifth Circuit's decision in *Willy v. Coastal Corp.*, which wrongly extended a limit upon the exclusive federal jurisdiction under patent law to the concurrent jurisdictional statutes of 28 U.S.C. §§ 1331, 1337, and 1441. This extension causes more problems than it solves and should be overturned.

This Court should grant Certiorari to resolve the existence of the artful pleading doctrine. The Fifth Circuit erred in not finding that the Respondents artfully pled to conceal their federal statutory claim. The artful pleading exception to the well-pleaded complaint rule will still support removal of this case, even when there is not complete federal preemption of a state law claim.

The Court should grant Certiorari and decide whether FLSA definitions impose statutory duties that supplement all employment relationships.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

[Filed Feb. 19, 1997]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50710

JENNIFER CASEY, *et al.*,
Plaintiffs/Appellants/
Cross-Appellees,

versus

RAINBOW GROUP, LTD. and ALAN SAGER,
Defendants/Appellees/
Cross-Appellants.

Appeal from the United States District Court
for the Western District of Texas

(A-93-CV-556)

Before GARWOOD, BARKSDALE and DENNIS, Circuit Judges.[1]

DENNIS, Circuit Judge:

The Plaintiffs/Appellants/Cross-Appellees in this case, as representatives of a class, challenge two rulings of the district court: 1) a final judgment, entered August 31, 1995, dismissing plaintiffs' case with prejudice; and, 2) an order, entered December 9, 1993, denying plaintiffs' motion to remand. Defendants/Appellees/Cross-Appel-

[1] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

lants appeal the final judgment to the extent that the court required each party to bear its own costs.[2]

The issue before this court is one of federal question jurisdiction. The complaint which led to removal from state court alleged a cause of action for breach of contract supported by two separate theories. The second theory relied, in part, on Fair Labor Standards Act ("FLSA") requirements that were allegedly incorporated into oral contracts made between the parties. *See* 29 U.S.C. § 201 *et seq.* On this basis, the defendants removed the case to federal court. Because we find that the district court lacked subject matter jurisdiction, we vacate the district court's orders with directions to remand the action to state court.

Facts and Proceedings Below

On February 20, 1992, Josephine Johnson, Jennifer Casey, Seantel Wilmes, and Ava Lott filed suit in Texas state court alleging breach of contract by the defendants, Rainbow Group, a limited partnership, and Alan Sager, its general partner. Rainbow Group operates a franchise of discount hair cutting establishments known as "Supercuts" throughout Texas though mainly concentrated in the Austin area. Plaintiffs moved for class certification, and in July of 1993, their request was granted, allowing for representation of "[a]ll hairstylists employed by Defendants Rainbow Group, Ltd. and Alan Sager at anytime between February 20, 1988 and the present." The court then granted defendants' previously filed special exceptions which asserted, *inter alia*, that the original complaint failed to plead all of the elements necessary to demonstrate a breach of contract. *See* Tex. R. Civ. P. 91.

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[2] The defendants' notice of cross-appeal indicates dissatisfaction with two additional rulings of the court. However, the defendants did not advance any arguments related to these matters in their briefs, and thus we consider the issues waived. Fed. R. App. P. 28(a); *see also Carmon v. Lubrizol Corp.*, 17 F.3d 791 (5th Cir. 1994).

Plaintiffs' response, filed on August 26, 1993, developed the claim in more detail. Specifically, plaintiffs alleged that: 1) oral contracts between the plaintiffs and the defendants "provided that hairstylists would be paid for all hours during which they were required to be at their prescribed place of work;" 2) "[i]n addition, or in the alternative," the contracts were required by law, "including the Fair Labor Standards Act, 29 U.S.C. § 207 and 29 C.F.R. Part 778," to provide the same; and, 3) that the defendants breached the agreements by refusing to pay for time spent waiting for customers and time devoted to mandatory meetings.

On the basis of the second petition, defendants removed the case to federal court asserting that it presented a federal question. Plaintiffs filed a motion for remand. By the consent of the parties, the remainder of the case, including plaintiffs motion, was heard by a magistrate judge (hereinafter "court" or "judge"). The court, without elaboration, denied remand.

During the four-day proceeding which followed, the court heard testimony related to Supercuts managers' keeping plaintiffs "off the clock"—i.e. not allowing the plaintiffs to count hours on their timesheets despite being present at the work site. The judge ruled that: 1) the practice of holding stylists off the clock was so routine as to constitute a modification of the contracts; and, 2) the FLSA did not establish any of the terms of the contracts. The court made it clear that it considered the plaintiffs' cause of action to be for breach of contract only, yet it "reaffirm[ed]" that it had subject matter jurisdiction "to determine whether the Plaintiffs are entitled to relief under the FLSA." Plaintiffs now appeal.

Standard of Review

The denial of a motion to remand an action removed from state to federal court is a question of both federal subject matter jurisdiction and statutory construction and is therefore reviewed by this court *de novo*. *Carpenter v.*

Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 365 (5th Cir. 1995) (citation omitted). The burden of establishing federal jurisdiction over a state court suit is placed on the defendant. *Id.*

Discussion

The right to remove a case to federal court derives from the statutory grant of jurisdiction in 28 U.S.C. § 1441. The statute allows for removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Here, there is no allegation of diversity of citizenship between the parties, and therefore removal must be predicated upon the federal question jurisdiction of the district courts. This requirement usually implicates § 1331 of the Judicial Code. Section 1331 grants original jurisdiction for "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Because the FLSA is potentially involved in this action, we look to § 1337, which provides for original jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce."[3] However, for our purposes, the distinction is irrelevant in light of the fact that courts "have not distinguished between the 'arising under' standards of § 1337 and § 1331." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8 n.7 (1983); *see also Beers v. North Am. Van Lines, Inc.*, 836 F.2d 910, 913 n.1 (5th Cir. 1988).

The question is thus reduced to determining whether the plaintiffs' action will be considered to "arise under" the FLSA. Unfortunately, the meaning of this seemingly simple standard has resisted all efforts by the courts to arrive at a coherent, easily applicable characterization. As noted by Wright and Miller, "[t]he most difficult single

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[3] 28 U.S.C. § 1337(a). *See, e.g., Brown v. Masonry Prod. Inc.*, 874 F.2d 1476, 1478 (11th Cir. 1989) (ruling that the court had jurisdiction of a Fair Labor Standards Act claim under § 1337 regardless of amount in controversy or diversity of citizenship and citing cases in accord), *cert. denied*, 493 U.S. 1087 (1990).

problem in determining whether federal question jurisdiction exists is deciding when the relation of federal law to a case is such that the action may be said to be one 'arising under' that law." 13B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3562 (1984) (footnotes omitted). The phrases "masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Franchise Tax Bd.*, 463 U.S. at 8 (footnote omitted).

Well-Pleaded Complaint

We begin our inquiry with the cornerstone to any determination of jurisdiction: the well-pleaded complaint rule. The rule provides that a plaintiff's well-pleaded complaint alone—not the removal petition or a defendant's responses—determines the existance of a federal question. *E.g., Merrell Dow Pharmaceuticals Inc. v. Thompson,* 478 U.S. 804, 808 (1986); *Carpenter*, 44 F.3d at 366. Thus, as throughout our jurisprudence, the plaintiff is the master of his complaint. *Carpenter*, 44 F.3d at 366 (citations omitted). He is free to proceed in state court and ignore claims that could have been asserted under federal law. Of course, this carries the risk of federal claims being precluded, but it does not provide a handhold by which a defendant can haul a suit into federal court. *Id.* (citations omitted).

The plaintiffs asserted in their amended petition that "oral employment contracts" provided that stylists "be paid for all hours during which they were required to be at their prescribed place of work." They also claimed that:

> In addition, or in the alternative, the contracts offered to hairstylists were required by law, including the Fair Labor Standards Act, 29 U.S.C. § 207 and 29 C.F.R. Part 778, to offer payment at the specified hourly rate for all hours during which stylists were required to be at a prescribed place of work.

> This legal requirement, incorporated into the stylists [sic] work contracts as a matter of law, could not be waived by the hairstylists.

Finally, they alleged that these terms were violated and prayed for compensation. It is evident from the petition that plaintiffs' claim for breach of contract is premised on two alternate theories. Obviously, the second has at least some relation to federal law. However, the first theory, that oral contracts created the obligation to pay the plaintiffs for all hours spent on-site, is grounded purely in state law and indicates no reliance on federal standards.

Whether such a scenario can provide for federal jurisdiction was squarely addressed by this court in *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988). Relying on the Supreme Court's decision in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988), the court in *Willy* recognized that the " 'well-pleaded complaint rule . . . focuses on claims, not theories.' " *Willy*, 855 F.2d at 1170 (quoting *Christianson*, 486 U.S. at 811). When the federal aspect of a plaintiff's claim "is not necessary to the overall success" of the claim, it cannot be said to "arise under" federal law. *Christianson*, 486 U.S. at 810; *see also Willy*, 855 F.2d at 1170-71. In this case, the plaintiffs could prevail solely on their allegation that oral contracts specifically provided that they be paid for the hours in dispute, and it is of no concern to this court which theory ultimately proves successful. In light of our decision in *Willy*, it is clear that the plaintiffs' allegations on their face do not allow for federal question jurisdiction. *See also Rains v. Criterion Systems, Inc.*, 80 F.3d 339 (9th Cir. 1996) (citing *Willy*).

Artful Pleading

The well-pleaded complaint rule, although firmly established and fundamental to a determination of jurisdiction, has not survived inviolate. In certain instances "where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he

may not avoid removal by artfully casting his federal suit as one arising exclusively under state law." *Carpenter*, 44 F.3d at 366. Thus, if the defendants here can demonstrate that the plaintiffs' claim is in fact federal in character, federal jurisdiction will stand. This corollary to the well-pleaded complaint rule is most often applied in the context of "complete preemption."[4] Although federal preemption alone ordinarily serves only as a defense, it occasionally "may so forcibly and completely displace state law that the plaintiff's cause of action is either wholly federal or nothing at all." *Carpenter*, 44 F.3d at 366.

Since its inception, courts have applied the complete preemption doctrine sparingly and usually with great reluctance. In fact, the Supreme Court has clearly sanctioned its use in only three instances. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (finding that § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA") completely preempted a plaintiff's common law contract and tort claims); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968) (finding that § 301 of Labor Management Relations Act of 1947 ("LMRA") completely preempted a plaintiff's action to enjoin a strike which was

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[4] Case law within this circuit also indicates that a plaintiff's motive in asserting a preempted state law cause of action can be relevant to a determination that he has "artfully pled." *See Aaron v. Nat'l Union Fire Ins. Co.*, 876 F.2d 1157, 1161 (5th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990). Defendants do not affirmatively argue that the plaintiffs fraudulently concealed a federal claim, although they do state in their brief that they do not consider the purely state law theory to be "viable." We acknowledge that, prior to filing this case, the plaintiffs did allege a claim under the Fair Labor Standards Act in federal court before voluntarily moving for dismissal. However, this, standing alone, will not support a finding of federal jurisdiction, and we find no other evidence indicating forum manipulation. *Cf. Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 369 n.7 (5th Cir. 1995) (reading the Supreme Court's decision in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), as suggesting that the artful pleading doctrine "should be limited to cases involving complete preemption of the state cause of action").

allegedly in violation of a collective bargaining agreement); *see also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (finding complete preemption for a state law complaint asserting a right of possession to Indian tribal lands). Although its boundaries and precise contours remain somewhat unsettled, our circuit and the Supreme Court have provided enough guidance for us to find that the FLSA will not satisfy the daunting standard required to completely preempt plaintiffs' breach of contract claim.

Complete preemption was first enunciated by the Supreme Court in *Avco* and is sometimes referred to as the "*Avco* exception." The Court, without extensive discussion, ruled that based upon § 301 of the LMRA federal jurisdiction existed over a suit seeking an injunction under state law for the breach of a collective bargaining agreement. *Avco*, 390 U.S. at 560. The court did not revisit the issue of complete preemption in any depth until 1983 when, in *Franchise Tax Board*, the Court explained that the result in *Avco* occurred because "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' " *Franchise Tax Bd.*, 463 U.S. at 23 (footnote omitted). Later cases have only re-emphasized the doctrine's limited nature. The Court in *Taylor* observed that even with the "unique pre-emptive force of ERISA" it was "reluctant" to find the "extraordinary pre-emptive power" required for federal jurisdiction. *Taylor*, 481 U.S. at 65. The Court was convinced only after observing that ERISA's jurisdictional grant closely mirrors that of § 301 of the LMRA and noting specific references to § 301 in the legislative history of ERISA. *Id.* at 65-67; *see also Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) (reiterating the powerful preemptive force necessary to convert a state law claim).

We consider *Taylor* to be a narrow extension of *Avco* and the result in *Avco* itself to be a narrow exception to

the rule that preemption is normally only a defensive issue and does not authorize removal. *Willy*, 855 F.2d at 1166. To find otherwise would eviscerate what remains of the well-pleaded complaint rule, and our holdings, through their rejection of a wide-ranging complete preemption doctrine, indicate an unwillingness to do so. *See, e.g., Anderson v. Am. Airlines, Inc.*, 2 F.3d 590, 597 (5th Cir. 1993) (refusing to apply complete preemption to a retaliatory discharge claim through either the Railway Labor Act or the Federal Aviation Act); *Aaron v. Nat'l Union Fire Ins. Co.*, 876 F.2d 1157, 1165-66 (5th Cir. 1989) (refusing to apply complete preemption to a wrongful death claim through § 5 of the Longshore and Harbor Workers' Compensation Act), *cert. denied*, 493 U.S. 1074 (1990); *Willy*, 855 F.2d at 1166 (refusing to apply complete preemption to wrongful discharge claim through a number of federal environmental laws); *Beers*, 836 F.2d at 913 n.3 (refusing to apply complete preemption to a number of state law claims through the Carmack Amendment to the Interstate Commerce Act); *cf. Trans World Airlines v. Mattox*, 897 F.2d 773, 787-88 (5th Cir.) (applying complete preemption to the Texas Attorney General's Texas Deceptive Trade Practices Act claim through § 1305(a)(1) of the Airline Deregulation Act), *cert. denied*, 498 U.S. 926 (1990).

The driving force behind federal question preemption is that the plaintiff has *"no state claim at all"* and an examination of the appropriate federal statute "reveals the suit's necessary federal character." *Carpenter*, 44 F.3d at 367 (emphasis in original). This requires that a federal statute not only preclude a state claim, but that it also evince an intent that such claims should proceed in a federal forum. Thus, before endorsing a finding of complete preemption outside of the LMRA, we demand a clearly manifested congressional intent to make state claims removable to federal court. *See Beers*, 836 F.2d at 913 n.3.

The FLSA was enacted in 1938 in order to "establish and gradually raise minimum wages." *Fleming v. A.H. Belo Corp.*, 121 F.2d 207, 212 (5th Cir. 1941), *aff'd*, 316 U.S. 624 (1942). The liability provisions of the act are contained in section § 216 and are confined to providing reparation for "unpaid overtime compensation" and "unpaid minimum wages." 29 U.S.C. § 216(b). The statute contains no indication of express preemption, let alone one that equals the "unique preemptive force" of ERISA. Moreover, neither the act itself nor its legislative history reveals a "manifest congressional intent" to allow removal of state law claims. Under the circumstances, we decline to find that complete preemption should apply to the case before us. *Cf. Morales v. Showell Farms, Inc.*, 910 F.Supp. 244 (M.D.N.C. 1995) (declining to find that the FLSA completely preempted a plaintiff's state wage and hour claims); *Fitzwater v. Namco Am., Inc.*, 1994 WL 809642 (N.D. Cal. Aug. 15, 1994) (declining to find that the FLSA completely preempted a plaintiff's claim for wrongful termination). We emphasize that we are ruling only that complete preemption does not exist, and we do not decide the issue of whether the plaintiff's claim is preempted in the ordinary sense.

Conclusion

We hold that the district court lacked subject matter jurisdiction and denial of the motion to remand was improper. We therefore VACATE the judgment of the court and REMAND the case to the district court with the instruction that it remand to state court.[5]

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[5] Plaintiffs make a claim for fees incurred due to the remand. It is within the discretion of the district court to award fees concomitant with an order remanding a case to state court. *See* 28 U.S.C. 1447(c). Because the district court has yet to confront the issue, we prefer to reserve any consideration of the matter. *See Miranti v. Lee*, 3 F.3d 925 (5th Cir. 1993) (discussing the applicable standards under § 1447(c)).

APPENDIX B

[Filed Aug. 31, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

Case Number: A-93-CA-556-ADA

JOSEPHINE JOHNSON, *et al.*

v.

RAINBOW GROUP, LTD., *et al.*

JUDGMENT IN A CIVIL CASE

* * * *

[xxx] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

The Court holds that the Plaintiffs have failed to establish that the Defendants breached their employment contract with the Plaintiffs. Therefore the Court does not address directly the question of whether the plaintiffs have met their burden of proof as to damages. The Court finds in favor of the Defendants and DISMISSES WITH PREJUDICE the Plaintiffs' case. All Parties will bear their own costs in this case.

DATED: August 31, 1995

WILLIAM G. PUTNICKI
Clerk

By /s/ Dorina Rodriguez
DORINA RODRIGUEZ
Deputy Clerk

APPENDIX C

[Filed Aug. 31, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Cause No. A-93-CA-556-ADA

JOSEPHINE JOHNSON, *et al.*

v.

RAINBOW GROUP, LTD., *et al.*

ORDER

The Parties tried this case before the Court, without a jury, during the week of July 14, 1995.[1] The Parties supplemented the testimony presented at trial with deposition excerpts. The Court has reviewed these excerpts. The Court enters the following findings of fact and conclusions of law:

Findings of Fact:

The Court makes the following findings of fact. This is an employment contract case.[2] The Defendants formed the Rainbow Group, Ltd., in Austin, Texas, more than a decade ago. The Rainbow Group, Ltd. does business under the trade name of Supercuts. The Rainbow Group

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[1] The Parties consented to trial before this Court pursuant to 28 U.S.C. § 636(c).

[2] The Plaintiffs filed their most recent Complaint in this case on August 24, 1993. This pleading was styled "First Amended Original Complaint."

operates a number of Supercuts stores throughout the State of Texas, but the majority of the stores are in Austin, Texas. Supercuts stores provide walk-in hair care to the public. Supercuts does not take appointments and customers are served on a first come-first served basis. Supercuts stores operate every day of the week for long and regular hours.

During the relevant period of time, the Defendants paid stylists on an hourly basis, and provided different incentive payments. The Defendants also provided training to every new stylists that a witness valued at $2,000. Supercuts also provides its full-time stylists with bonuses, paid holidays, paid vacations, life insurance plans, and major medical coverage. Most, if not all of the stylists received tips from customers in addition to their wages. The amount of tips that customers left varied on a daily basis and also varied among the different stylists.

During the relevant period of time, there were several levels of employees in each Supercuts store. Defendants hired stylists to work full time and part time. The Defendants did not promise prospective stylists any specific number of hours per week. The Defendants did not promise prospective stylists that they would pay them for time that they were in the store but not on the clock. The Court finds no evidence that this specific issue was ever discussed between the Plaintiffs and Defendants prior to the time when they began working at the various stores. The only issue that the Court can determine was uniformly discussed between the Parties prior to the beginning of their employment was the amount of their wages and benefits. Some of these stylists served a second, or additional, function as a shift manager. A shift manager was a stylist who was given administrative functions such as opening or closing the store. Each store usually also had a manager who was in charge of scheduling hours for stylists and who controlled when the Plaintiffs could clock in.

The store managers scheduled stylists to work on flexible shifts that changed daily. The managers of individual Supercuts stores ordered some stylists not to "clock-in", even though the stylists were required to remain in the store. Stylists were held off the clock by in-store management.[3] Some of the Plaintiffs who were acting as shift supervisors or as managers held other stylists off the clock. For example, Plaintiffs Ava Lott and Jennifer Washington both testified that, during the time that they were in-store managers, they held stylists off the clock. The Supercuts upper management never authorized or endorsed this practice of holding stylists off the clock. After learning that stylists store managers were holding stylists off the clock, Supercuts upper management instructed in-store management not to keep stylists off the clock.

Given that the time period involved in this case was several years ago, the stylists who testified were uniformly unable to testify accurately concerning the number of hours that they were available in the store but kept from working. No witness was able to testify, with any certainty, the number of times or the number of hours that he or she was held off the clock. There was dramatic disparity in the testimony as to which shifts were the busiest, which periods of the year were the busiest, and which store locations were busy. The evidence was uniform that customers were slow to come whenever a new store opened. For example, Jennifer Washington testified that she had a different experience of being held off the clock at the Bee Caves store as opposed to the store located on Research. While all of the Plaintiffs testified that they were held off the clock, their testimony of the number of hours they were held off the clock was controverted by

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[3] For purposes of this Order, the Court will use the terms "hold off the clock" or "held off the clock" as meaning that a stylist was required to be present in the Supercuts store, either during the workday, or for meetings, but was instructed by a Supercuts manager not to clock in or was not "signed in" by a manager.

the records maintained by Defendants. For example, Ms. Elaine Brewer could not offer even an estimate of the number of hours that she believes that she was held off the clock. There were also an occasional discrepancy between a stylist's deposition testimony and her testimony at trial. For example, Ms. Lisa Small testified at her deposition that she had been held off the clock for ten hours, but at trial she testified that it was three to five hours per week. It is virtually impossible, even if one has the time records, to determine whether a stylist who was returning from lunch was held off the clock, voluntarily stayed off the clock, or was working a split shift. For example, Ms. Emily Hebert testified that it was her best recollection that she was a stylist wtih Supercuts for six months; but, the Defendants' time records establish that Ms. Hebert was a stylist for approximately six weeks. Several of the stylist served at least part of the time as shift managers or managers. Stylists who served as shift managers were routinely not held off the clock, at least for the morning shifts. The Plaintiffs did not establish the number of stylists who were scheduled to work at any period of time. Ms. Machu, for example, testified that she was never held off the clock after she became a shift manager. Other witnesses testified that they were held off the clock, but less frequently, when they became shift managers. The common thread that ran through all of the Plaintiffs' testimony was that store managers routinely held stylists off the clock when the stores were slow and that the stylists were unhappy about this practice but accepted it by sitting off the clock.

There were occasions when stylists were not paid for the following work related activities: attending store meetings, attending merchandise meetings, and travelling between stores during the workday. Several of the Plaintiffs testified that they were required to attend meetings and that they were not compensated for their attendance. The Court finds that the Plaintiffs failed to establish any clear pattern or policy of either requiring stylists to attend meetings or of non-payment for such meetings. Each

manager in each store appeared to have a different policy in terms of the frequency of store meetings. For example, Ms. Lyon testified that the meetings took place once a month. Other witnesses testified that the meetings were considerably less frequent. Ms. Dorothy Dark testified that she has always paid stylists for every meeting that they attended. Ms. Machu testified that store meetings were only held once every six months. Plaintiffs established that some of these meetings were mandatory, and that some of the stylists were not paid for some of these meetings. Defendants established that no punitive action was taken when a stylist failed to attend meetings. The testimony was even less consistent with regard to store meetings related to the sale of products. Therefore, the Court finds the Plaintiffs failed to establish that they are entitled to recover lost wages for these meetings.

Several of the Plaintiffs testified that the Defendants promised that them that they would work forty hours per week. There is no evidence that this promise was ever ratified by any of the upper level management. While the Plaintiffs may have believed that they were promised a minimum of forty hours, the Court finds that Defendants did not promise any Plaintiff that she would work forty hours per week, or any minimum number of hours, at Supercuts. The Court bases this finding on a review of the policy manual, and the uniform testimony of all of the former stylists that there were occasions when they would be instructed not to come into work until later or to leave early. Many of the stylists testified that they received forty hours in their first "training" week, but most of the stylists did not work forty hours in the first weeks they worked at Supercuts. It was standard for the shift manager or manager to call stylists and tell them to delay coming into work. It was also standard operating procedure for the shift managers and managers to tell stylists to leave before the end of their scheduled shift. Supercuts' advertisements offered thirty hours per week to full time stylists. The policy was also clear that only full time

stylists were eligible for benefits such as vacation time, and that a stylist was eligible for vacations if she worked only thirty hours a week. In other words, all of the stylists learned early in their employment relationships with Supercuts that there would be weeks when they would work fewer than forty hours or be scheduled for fewer than forty hours.

Supercuts provided a bonus or incentive payment to its stylists in addition to an hourly salary. The number of dollars that a stylist earned from various services, haircuts, shampoos, blow drying hair, etc., was divided by the number of hours that a stylist was on the clock. If the amount of money earned per hour on the clock was above a certain minimum, then the stylist received a percentage of that additional amount of money. Supercuts established that a stylist could earn more dollars in a shift, all things being equal, if she had a higher amount of productivity in a shorter number of hours. Supercuts argues that had these stylists been on the clock during slow hours, then they would have had a lower productivity ratio, and they would not have received incentive payments. For example, Ms. Tammy Peterson received five separate pay raises on the bases of her productivity. Ms. Terri Giles, a defense witness, testified that she voluntarily elected to stay off the clock in an effort to maximize her incentive payments. On the other hand, several of the Plaintiffs never received wage increases on the basis of productivity.

The one fact that was uniformly established at trial was that it was the routine practice of managers to hold the Plaintiffs off the clock when the stores had only a few customers. Each of the Plaintiffs testified that they continued working, for at least some period of time, after it became apparent to them that they would be held off the clock by their managers.

Conclusions of Law:

No written contract was ever executed between the stylists and the Defendants. This is not unusual in an employment situation, and the Court finds that an at-will contract existed between Supercuts and the stylists who performed hair styling services during the relative time period. An at-will employment contract continues between parties at their pleasure and either may end it at any time without cause. *East Line & R.R.R. Co. v. Scott,* 10 S.W. 99 (1888). The critical questions that the Court will address below is: what were the terms of the contract between Supercuts and the Plaintiffs, and did the Defendants breach the contract? The fact that Supercuts scheduled a person for a shift of work did not, in and of itself, create a contractual agreement to pay the employee for that entire period of scheduled time. Defendants offered the Plaintiffs salary and benefits if they would come into the store at the time Defendants' managers scheduled them to arrive and work their shift. The Plaintiffs accepted this offer by arriving at work willing to work cutting hair. The question thus becomes whether Defendants' managers breached this contract when they refused to allow the stylist to clock in when the stylist arrived at the store; or whether the regular practice of holding stylists off the clock modified the terms of the employment contract. The Plaintiffs do not contend that they are entitled to recover under a theory of quantum meruit. The Plaintiffs also do not claim that they are entitled to recover for, and the Court renders no opinion with regard to, any periods of time when managers instructed stylists to come in later than scheduled, to take "long" lunches, or to leave earlier than scheduled.

All of the Plaintiffs testified that they were routinely held off the clock by store managers when the store was slow in terms of customers. All of the Plaintiffs testified that being held off the clock differed from the employment terms they thought they were accepting by coming to work at Supercuts. None of the Plaintiffs elected to

terminate their employment relationship in response to being held off the clock. None of the Plaintiffs testified that anyone at Supercuts agreed to pay them for time that they were not on the clock. The Plaintiffs allege, and the Court finds that store managers at Supercuts adopted a clear policy in its stores of holding stylists off the clock when business was slow. The Court finds that the practice of store managers holding stylists off the clock occurred on such a routine basis that it was not a breach of the terms of an executory, at-will contract, rather, it was a modification of the terms of the contract. The Plaintiffs' testimony was uniform that they were held off the clock unless the stores were busy enough to justify their being allowed on the floor. While the Court does not sanction the practice of holding employees off the clock, the Court finds, as a matter of law, that the Plaintiffs accepted the change or modification in the terms of their employment contract by continuing to come to work and sitting off the clock when ordered to do so by store managers. The Plaintiffs testified that they complained to their store managers and to each other about being held off without tangible results. The Plaintiffs established that being held off the clock was a common practice, and the Court finds that it was a modification to the agreement between the Parties.

Parties have the authority to modify their contracts. It is hornbook law that the modification must meet the minimum contract requirements, including a meeting of the minds. *Jennings v. Minco Technology Labs, Inc.*, 765 S.W.2d 497, 499 (Tex. App.—Austin, 1989 no writ) and *Mandril v. Kasishke*, 620 S.W.2d 238 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.). In at-will employment relationships, either party may impose modifications to the terms of employment as a condition of continued employment. *L.G. Balfour Co. v. Brown*, 110 S.W.2d 104, 107 (Tex. Civ. App.—Ft. Worth 1937, no writ). The Court finds that the facts establish that the store managers modified the terms of employment by holding the stylists off the clock; and the stylists accepted

these terms by staying off the clock—as opposed to quitting. The Plaintiffs alleged in their most recent pleading that the Defendants promised to pay for all hours that stylists were required to be in the stores. The Court recalls no such evidence that the Defendants made this specific agreement with any of the stylists. To the contrary, much of the testimony involved whether the stylists were offered a forty hour work week. To the extent that the Plaintiffs interpreted their job offer to contain a specific promise that they would be allowed to clock in when they arrived at a store for their scheduled shift, the store managers modified this agreement by holding the Plaintiffs off the clock.

The Plaintiffs' argument that they did not have "clear and unequivocal" notice of this modification of their employment agreement is without merit for several reasons. First, they were the ones being held off the clock without pay on a ragular basis. Second, the Plaintiffs testified uniformly that the practice of being held off the clock was widespread and that they accepted it because they were naive. The Plaintiffs had notice that they were not being paid for time they were held off the clock every time that they received a paycheck. The fact that the Plaintiffs were naive, or young, or inexperienced, does not mean that they did not appreciate the fact that the store managers were forcing them to remain off the clock, and that this differed from the terms of the employment contract that they had originally accepted. Several of the Plaintiffs went so far as to hold others off the clock when they served as shift managers or managers. Others left Defendants' employ and returned knowing that store managers held stylists off the clock during slow periods of time. Several of the Plaintiffs observed the practice of holding stylists off the clock while they were receptionists and then elected to become stylists themselves. There can be no debate but that they these particular Plaintiffs had clear and unequivocal notice of a modification of the terms of their employment when they are imposing the

modification on others. As a matter of law, the Plaintiffs accepted this modification by retaining the employment. *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986), *citing, Balfour*, 110 S.W.2d at 107.

The Plaintiffs claims are for breach of contract and they do not seek to recover damages under the Fair Labor Standards Act ("FLSA").[4] Instead, Plaintiffs argue that Section 207 of the FLSA, through the Labor Department's rules, 29 C.F.R. Part 778 mandates an employer to offer payment of the Plaintiffs' hourly rate for all hours in which an employee is required to be present at his place of work. In other words, the Plaintiffs argue that Defendants could not, pursuant to the terms imposed by the FLSA, offer to pay less than an agreed hourly rate (at least minimum wage) for all hours worked. The Court reaffirms its earlier determination, based on the Plaintiffs' pleadings for relief, that it had subject matter jurisdiction to determine whether the Plaintiffs are entitled to relief under the FLSA.

Plaintiffs' argue that this case is governed by the FLSA regulation definition of "hours worked". The Defendants assert that this argument is limited to a claim for overtime pay and minimum wage claims. The Court holds that the FLSA does govern the definition of hours worked, but that the FLSA's definition of hours worked does not establish the terms of the contract between the Parties.

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[4] Paragraph III of the Plaintiffs' First Amended Original Petition reads as follows:

> In addition, or in the alternative, the contracts offered to hairstylists were required by law, including the Fair Labor Standards Act, 29 U.S.C. § 207 and 29 C.F.R. Part 778, to offer payment at the specified hourly rate for all hours during which stylists were required to be at a prescribed place of work. This legal requirement, incorporated into the stylists [sic] work contracts as a matter of law, could not be waived by the hairstylists.

Paragraph VI of the same pleading reads in pertinent part:

> As a result of this breach of contract plaintiffs and the members of their class have suffered loss of wages.

The Court holds that the Plaintiffs' claim of breach of contract that is implied at law under the FLSA is without merit. The Court holds that the FLSA does not set the terms of the contract between these Parties; rather, the Parties themselves set the terms of their contract. If the terms of the contract between the Parties in this case violated the FLSA, then Plaintiffs' appropriate legal claim for recovery was for a violation of the FLSA. For example, had the Parties agreed that the stylists would work for one dollar per hour, and had the Defendants paid the stylists one dollar per hour, the appropriate claim would not be for breach of contract but for violation of the FLSA's minimum wage requirement. Although the Court's determination that the FLSA's definition of "hours worked" governs this case, it does not entitle the Plaintiffs to recover damages for breach of contract from the Defendants. The Court finds that it would be improper to superimpose the requirements of the FLSA on state contract law. The remedies for breach of contract and violation of the FLSA have different statutes of limitations. Also, the Texas Civil Practices and Remedies Code provides specific requirements concerning notice of breach with regard to the recovery of an award of reasonable and necessary attorneys' fees.[5] The Court holds that one must allege a claim for recovery under the FLSA to obtain relief, that one cannot do so under a theory of breach of contract.

The Plaintiffs did not plead a claim for recovery under a theory of quantum meruit. The Plaintiffs' counsel stipulated at trial that Plaintiffs are not pursuing a theory of recovery for quantum meruit. The Court holds, as a matter of law, that the Plaintiffs are not entitled to recover under a theory of quantum meruit. *Centex Corp. v. Dalton*, 840 S.W.2d 952, 955 (Tex. 1992).

Both Parties have raised the issue of whether a class-wide contract existed. The Court had previously certified

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[5] Plaintiffs ask for attorneys fees only under Chapter 38 of the Texas Practices & Remedies Code.

the Plaintiffs as a class for purposes of determining the breach of contract issue. The Court has determined above that the Defendants did form oral employment contracts with the Plaintiffs to perform as hairstylists and that the managers in the store modified this contract by holding the Plaintiffs off the clock. The Court determines that this was done on a class-wide basis, and reaffirms its decision that common questions of fact and law regarding the terms of the employment contract exist. The Court finds that the Plaintiffs have failed to establish that the Defendants breached the terms of the class-wide contract.

In summary, the Court holds that the Plaintiffs have failed to establish that the Defendants breached their employment contract with the Plaintiffs. Therefore the Court does not address directly the question of whether the Plaintiffs have met their burden of proof as to damages. The Court finds in favor of the Defendants and DISMISSES WITH PREJUDICE the Plaintiffs' case. All Parties will bear their own costs in this case.

SIGNED this the 31st day of August, 1995 at Austin, Texas.

/s/ Alan D. Albright
ALAN D. ALBRIGHT
United States Magistrate Judge

APPENDIX D

28 U.S.C. § 1331 Federal Question

The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1337 Commerce and Antitrust Regulations; Amount in Controversy, Costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11707 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

28 U.S.C. § 1338 Patents, plant variety protection, copyrights, mask works, trade-marks, and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress re-

lating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.

(c) Subsections (a) and (b) apply to exclusive rights in mask works under chapter 8 of title 17 to the same extent as such subsections apply to copyrights.

28 U.S.C. § 1441 Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine

all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.